Filed 12/14/09 In re A.H. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

In re A.H. et al., Persons Coming Under the Juvenile Court Law.	
SHASTA COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. S.H., Defendant and Appellant.	C062015 (Super. Ct. Nos. 05JVSQ2611401; 05JVSQ2611501)

Appellant, the mother of A.H. and Ale.H. (the minors), appeals from the juvenile court's order terminating parental rights. (Welf. & Inst. Code, §§ 366.26, 395.)[1] Appellant claims there was insufficient evidence to support the juvenile court's finding that A.H. is adoptable.[2] We shall affirm.

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[1] Undesignated statutory references are to the Welfare and Institutions Code.

[2] Appellant's argument regarding adoptability pertains only to A.H.; she concedes there is no issue regarding Ale.H.'s adoptability.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2005, a juvenile dependency petition was filed concerning the minors--16-month-old A.H. and two-month-old Ale.H.--based, in relevant part, on appellant's alcohol and substance abuse problem and her history of domestic violence with each of the minor's fathers. The petition alleged that, immediately preceding the filing of the petition, appellant, who was intoxicated, dropped the minors and fell on top of them, causing A.H. to suffer abrasions and rendering Ale.H. unconscious. Appellant was on felony probation at the time and was arrested following the incident.

Prior to the jurisdictional hearing, concerns arose regarding A.H.'s mental development, and she was assessed for possible delays.

The juvenile court sustained the allegations in the petition in relevant part and ordered reunification services for appellant and A.H.'s father.[3]

A report for the 90-day review hearing noted that A.H., who was now two years old, was not able to speak and was receiving developmental services from Far Northern Regional Center. She fell frequently, did not appear to feel pain, and was described as "difficult to contain." She had to be fed because she would "put so much food into her mouth at one time[] that she chokes."

By December 2006, the social worker was recommending that services be terminated, in part because appellant did not have

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[3] Ale.H.'s alleged father was denied services. Paternity testing later excluded him as Ale.H.'s father.

adequate housing and had difficulty supervising the minors during visits. In addition, she failed to follow through on the recommendations contained in her psychological evaluation, did not attend the recommended aftercare following her substance abuse program and, although she had completed parenting classes, she had been unable to integrate the information and apply it during visits.

Meanwhile, A.H. had been diagnosed with autism. Although her foster parents later reported she was "on the high functioning end of the autism scale," she required constant supervision and "could do harm to herself if not monitored continually." According to the social worker, A.H. was "accustomed to a structured environment and must have her needs met to stay healthy." It was the social worker's opinion that appellant had not established any stability since the initiation of dependency proceedings and remained "at high risk for violence and substance abuse."

The 12-month review hearing was continued numerous times and eventually was combined with the 18-month review. In July 2007, the minors were placed together with foster parents who were trained to parent autistic children and were willing to adopt the minors if reunification did not occur.

By January 2008, A.H. was demonstrating only mild cognitive delays, in contrast to the significant delays exhibited during previous testing. A bonding assessment obtained by the foster parents in April 2008 found that A.H. showed "tremendous growth" compared with prior evaluations. The evaluator noted that

A.H.'s "eye contact and interactions were extremely appropriate and not at all indicative of autism" and that her "behavior was remarkably advanced in comparison to past observations." She was spontaneous with affection for her foster parents and demonstrated a broad range of appropriate emotions.

The review hearing finally commenced in July 2008, following which the juvenile court terminated reunification services and set the matters for a hearing pursuant to section 366.26 to select and implement a permanent plan for the minors.

In January 2009, the foster parents filed a caregiver information form, in which they explained that A.H. had progressed behaviorally and emotionally since overnight visits with her father were discontinued, and she was no longer violent or angry. She had developed friendships in her play group and exhibited empathy toward other children. They observed that A.H., "like most [a]utistic children, needs the comfort/knowledge of routine" and "flourishes when having stability."

In her report for the section 366.26 hearing, the social worker recommended a permanent plan of adoption. A.H. was described as "an engaging girl with beautiful long brunette hair and striking green/hazel eyes" who, other than symptoms associated with her autism diagnosis, was healthy and "adored by her prospective adoptive family." The report noted that, "[w]hen stressed, [A.H.] has been observed to withdraw socially, roll her tongue, flap her hands, walk in circles, walk on her tip toes, head bang, chew her hands or scratch herself, and wake

frequently at night." Her problem behaviors included "rough play with other children, demanding behavior, temper tantrums, trouble adjusting to changes, and compulsiveness and rigidity in everyday tasks."

By this time, the prospective adoptive parents had been the minors' foster parents for 18 months and had expressed a strong desire to adopt them. They "were well aware of [A.H.'s] diagnosis and ongoing need for intervention services" and had sought out additional information and resources to ensure that A.H.'s educational needs were being met. They also had "demonstrated excellent parenting skills and judgment" during the minors' placement with them, "particularly in providing and advocating for [A.H.'s] special needs resulting from [a]utism." A.H. had "made tremendous advances in her emotional, social, and language development" while in their care. Finally, the minors appeared to have developed a strong bond with them.

According to the social worker, even if the prospective adoptive parents were unable to adopt A.H., a preliminary search identified 280 families available for children with A.H.'s "characteristics, including developmental delay."

At the section 366.26 hearing, appellant and A.H.'s father argued that an exception to adoption applied based on their relationships with the minors. No issue was raised as to the adoptability of the minors. The juvenile court found the minors adoptable and, concluding that the exception to adoption did not apply, terminated parental rights.

DISCUSSION

Appellant contends the evidence was insufficient to support a finding that A.H. was likely to be adopted.[4] We disagree.

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . The permanent plan preferred by the Legislature is adoption.'" (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, italics omitted.) "In order for the court to select and implement adoption as the permanent plan, it must find, by clear and convincing evidence, the minor will likely be adopted if parental rights are terminated." (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; § 366.26, subd. (c)(1).)

Generally, "[t]he issue of adoptability posed in a section 366.26 hearing focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) "[T]he fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In

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[4] Although appellant did not raise this claim in the juvenile court, appellate courts have concluded that, "[w]hen the merits are contested, a parent is not required to object to the social service agency's failure to carry its burden of proof on the question of adoptability." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623, cited with approval in *People v. Butler* (2003) 31 Cal.4th 1119, 1126, fn. 4.)

other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family." (*Id.* at pp. 1649-1650.)

We review an order terminating parental rights for substantial evidence. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Turning to the present matter, the evidence of A.H.'s general adoptability went unchallenged at the section 366.26 hearing and, thus, is uncontroverted. There was evidence before the juvenile court that A.H. was on the mild end of the autistic spectrum and had made tremendous strides in her development and behavior since her initial diagnosis. The bonding evaluator noted the absence of traits in A.H. normally associated with autism during his assessment. Aside from her autism, A.H.'s age, health and physical characteristics rendered her adoptable. The fact that she had been in the same home for one and one-half years and the family wanted to adopt her further supports the court's conclusion that she was adoptable.

Appellant argues that the social worker did not accurately portray the nature and severity of A.H.'s diagnosis when assessing the availability of other families to adopt her. She

relies on the statement in the social worker's report that 280 families had been identified for children with A.H.'s "characteristics, including developmental delay." Appellant maintains that A.H.'s diagnosis was far more significant than a developmental delay, because she required constant supervision to prevent her from hurting herself or others and has "manic mood characteristics" that are likely to dissuade other families from adopting her.

Neither appellant nor any other party sought to explore or clarify the statement in the social worker's report regarding the availability of other families willing to adopt a child like A.H. As the social worker reported that she searched for families willing to take children with A.H.'s characteristics, we will not assume that the social worker failed to accurately portray A.H.'s challenges when searching for other available families.

Appellant also claims the significance of A.H.'s long-term placement with her prospective adoptive parents was undercut by the foster father's failure to appreciate that A.H. "was honing in on her full potential as an autistic individual." She bases this argument on information contained in one of the social worker's reports concerning the age at which symptoms of autism begin to manifest. In this regard, the social worker reported: "The disturbance must be manifest by delays or abnormal functioning in at least one (and often several) of the following areas prior to age [three] years: social interaction, language as used in social communication, or symbolic or imaginative

play. In most cases, there is no period of unequivocally normal development, although in perhaps 20% of cases, parents report relatively normal development for [one] or [two] years. In such cases, parents may report that the child acquired a few words and lost these or seemed to stagnate developmentally. By definition, if there is a period of normal development, it cannot extend past age [three] years."

Based on this information, appellant asserts that services for A.H. in the future "were going to, at best, maintain [her] current level of functioning" because she "was reaching the age where services were not going to promote further progress," and that the foster father was deluded in believing that A.H.'s autism would not hold her back as long as she got the help she needed. She maintains the foster parents' optimism about A.H.'s future was the result of her having been in their home during this period, which "would end within months."

The problem with this argument is that appellant mistakenly interprets the general information about autism provided by the social worker as signifying that a child with autism cannot experience *any* development past the age of three. Rather, the significance of this information is that, in some cases, an autistic child may appear to experience normal development up to age three years, but after that age, all autistic children begin to manifest traits and developmental delays associated with the diagnosis. But the fact that autistic children do not experience *normal* development past the age of three does not mean they cease to develop at all.

In any event, there is no evidence in the record that the foster parents' commitment to the minors was contingent on an expectation that A.H. would one day no longer face challenges attendant to her autism. To the contrary, they "were well aware of [A.H.'s] diagnosis and ongoing need for intervention services."

Relying on *In re Jayson T.* (2002) 97 Cal.App.4th 75 (disapproved of on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396), appellant argues that the juvenile court should have focused on A.H.'s characteristics, not on how well she was doing in her prospective adoptive home. It is true that *Jayson T.* commented on the "trap that a trial court may easily fall into" when it terminates parental rights based on the existence of a committed prospective adoptive placement that later falls through. (*Id.* at p. 88.) However, the issue addressed by the court was whether an appellate court should accept posthearing evidence in such cases. In fact, *Jayson T.* recognized "it is only common sense that when there is a prospective adoptive home in which the child is already living, and the only indications are that, if matters continue, the child will be adopted into that home, adoptability is established." (*Ibid.*) Accordingly, *Jayson T.* provides no support for appellant's claim.

Finally, even if we were to find A.H. was not generally adoptable, her placement for 18 months with prospective adoptive parents who were strongly committed to adopting her brother and her rendered her specifically adoptable. "[A] minor who ordinarily might be considered unadoptable due to age, poor

physical health, physical disability, or emotional instability . . . nonetheless [may be found] likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child." (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650.) Such was the case here.

Appellant points out that, when a child is specifically adoptable, the juvenile court must consider whether there are any legal impediments to adoption by the prospective adoptive parents. She distinguishes the circumstances here from those in *In re Carl R.* (2005) 128 Cal.App.4th 1051 and *In re Helen W.* (2007) 150 Cal.App.4th 71, in which the prospective adoptive parents had extensive experience working with disabled children.

We note that a lack of experience does not constitute a legal impediment to adoption. Moreover, any lack of experience on the part of the foster parents when the minors were first placed with them was overcome during the year and a half the minors were in their care, during which the foster parents established an exceptional ability and willingness to parent a child with developmental challenges.

In sum, A.H.'s qualities and the fact that prospective adoptive parents had been identified who wanted to adopt her provide ample support for the juvenile court's finding of adoptability. To the extent A.H. has special needs, there is no evidence in the record that this presented an impediment to adoption at the time of the section 366.26 hearing. Accordingly, substantial evidence supports the court's finding that A.H. is adoptable.

DISPOSITION

The juvenile court's findings and orders regarding A.H. are affirmed. The appeal is dismissed as to Ale.H.

SIMS, Acting P. J.

We concur:

HULL, J.

CANTIL-SAKAUYE, J.